

ROBERT L. FOLKS & ASSOCIATES, LLP
ATTORNEYS AT LAW

510 Broad Hollow Road, Suite 304A
Melville, New York 11747

ROBERT L. FOLKS
CYNTHIA A. KOURIL

(631) 845-1900
Telecopier: (631) 845-8779

Thomas L. Costa
Of Counsel

October 29, 2009

Honorable Dora L. Irizzary
United States District Court, E.D.N.Y
225 Cadman Plaza East
Brooklyn, New York 11201

*Re: Novak v. Active Window Publications, Inc., et al.
Index No. CV 01 3566*

Dear Judge Irizzary:

On Tuesday afternoon, October 27, 2009, I received a copy of plaintiff's "Status Report" (attached hereto as Attachment A). I am unaware of any request for such a status report. I have my ECF set up so that notices go to two separate email accounts, my firm RLFassoc.com account and another account at AOL. I do this in case of a service outage at either account.

This morning I spent three hours examining the account history for both accounts and could not find an ECF bounce for a request for a status report.

I ran the docket sheet for all of 2009 (Attachment B) and there is no docket entry for such a request.

Our office calendar does not have such a request diaried.

I received no notice from Mr. Novak by mail or otherwise that the Court had requested a status report, nor does his submission allege that he gave me such notice.

I would NEVER ignore such a request from the Court.

The status of the case is that on October 5, 2009, Judge Wall issued the SECOND preclusion order in this case due to plaintiff's utter failure to respond to discovery demands in a meaningful way. For example, in response to a request for witnesses,

plaintiff listed only himself but then "reserved the right" to call other witnesses at trial. In response to a demand for medical records including pharmacy records, plaintiff returned a single signed medical authorization without providing the names or addresses of any doctors or pharmacists.

Judge Wall's Preclusion Order contained a cryptic passage to the effect that there was no motion before him relating to plaintiff's failure to respond to Notices to Admit.

I have sent a letter to Judge Wall (Attachment C) asking for clarification of this portion of his Order. If as a result of that clarification, should no further motion practice before Judge Wall be required, it is my plan to request a briefing schedule for a Motion for Summary Judgment.

Defendants vehemently disagree with the unfounded accusations made by plaintiff in his status report.

Further, defendants notified Judge Wall in April 2009 that they were prevented from taking deposition by plaintiff's failure to identify any witnesses or to provide any documents in response to our various demands (Docket #175). Further information about the actual status of discovery can be found in our Motion for Sanctions (Docket #179) and our Reply in Support of Motion for Sanctions (Docket #181).

Respectfully,

/ss/ Cynthia A. Kouril

CYNTHIA A. KOURIL (CAK4899)

CAK:rq
Attachments

Attachment A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
ROBERT NOVAK, d/b/a PetsWarehouse.com
Plaintiff,

-against-

No. CV 01 3566
(DLI)(WDW)

ACTIVE WINDOW PUBLICATIONS, INC.,
ROBERT HUDSON d/b/a AQUABOTANIC.COM
Defendants,

-----x

To: Judge Dora Irizarry

STATUS REPORT

Robert Novak Plaintiff pro se replying to the Courts request for a joint status report states the following:

The Courts request to file this report jointly is not possible due to the fact that defense attorney Ms. Kouril has been the most uncooperative defense attorney I have encountered in all the Federal cases I have been involved in. She refuses any telephone email or fax communication. She insists on mail only communication.

I have been trying in good faith to conclude discovery for about 1 year. Defendant has taken 8 months to produce documents, then made a frivolous motion for sanctions recently alleging that I failed to comply with their discovery requests.

When I made a timely request to examine the defendant,¹ Ms. Kouril failed to reply in any manner what so ever. Defendant failed to appear it is apparent that Ms. Kouril aided by her secretary dodged the calls from my office the day before the scheduled deposition till so late in the afternoon that I had to cancel the court reporter or be billed for defendant's non appearance.

Thereafter, she claimed that her pending motion for sanctions stayed defendant's appearance, a claim denied by Judge Wall.

However, I lost out on the request to examine defendant timely made before Judge Wall's deadline of September 30, 2009, a right I thought I had as matter of law.

¹ The Court should note that defendants never requested any deposition of the Plaintiff, prior to the 9/30/2009 deadline.

Attachment A

I followed the courts time constraints, the defendants did not. Now I'm precluded from deposing the defendant. I don't believe that it is fair and equitable.

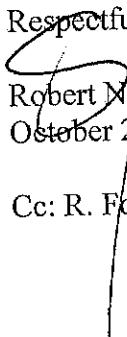
Ms Kouril has been playing fast and loose with the judicial system since the onset of this case as the docket shows. They have no defense other than delay, which they have done a masterful job of.

In order to move this case forward I request that defendant appears at a deposition, the only one I requested. Judge Walls order denying me that opportunity will likely prejudice my case at trial.

Alternatively, if this Court believes that the plaintiff should be deprived of a deposition I have no choice but to proceed to trial.

I fully intend to continue this case to trial.

Respectfully submitted,


Robert Novak
October 21, 2009

Cc: R. Folks by mail.

MAG

U.S. District Court
Eastern District of New York (Central Islip)
CIVIL DOCKET FOR CASE #: 2:01-cv-03566-DLI-WDW

Novak, et al v. Active Window, et al
Assigned to: Judge Dora Lizette Irizarry
Referred to: Magistrate William D. Wall
Demand: \$0
Member case: ([View Member Case](#))
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 05/30/2001
Jury Demand: Plaintiff
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Plaintiff

Robert Novak
d/b/a Pets Warehouse.com

represented by **Robert Novak**
1550 Sunrise Highway
Copiaque, NY 11726
(631)842-0400
Fax: (631)789-9340
PRO SE

V.

Defendant

Active Window Publications, Inc.

represented by **Cynthia A. Kouril**
Robert L. Folks & Associates, LLP
510 Broad Hollow Road
Suite 305
Melville, NY 11747
631-845-1900
Fax: 631-845-8779
Email: ckouril@RLFassoc.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert L. Folks , Sr.
Robert L. Folks & Associates, LLP
510 Broad Hollow Road
Suite 305
Melville, NY 11747
631-845-1900
Fax: 631-845-8779
Email: lawfolks@aol.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Mark Rosenstein

represented by **Cynthia A. Kouril**

Attachment B

Eastern District of New York - Live Database Version 4.0.2

Page 2 of 5

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert L. Folks , Sr.
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Cynthia S. Powers
TERMINATED: 07/30/2007

represented by **Cynthia S. Powers**
5617 Tyler Street
The Colony, TX 75056
PRO SE

Defendant

Dan Resler
TERMINATED: 03/01/2002

represented by **Hilary B. Miller**
112 Parsonage Road
Greenwich, CT 06833-3942
(203) 399-1320
TERMINATED: 03/01/2002
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Jared Weinberger
TERMINATED: 03/01/2002

Defendant

Thomas Barr
TERMINATED: 07/30/2007

Defendant

John Doe
TERMINATED: 07/30/2007

Defendant

Mary Roe
TERMINATED: 07/30/2007

Defendant

Robert Hudson
doing business as
Aquabotanic.com

Counter Claimant

Active Window Publications, Inc.

represented by **Robert L. Folks , Sr.**
(See above for address)
LEAD ATTORNEY

Attachment B

Page 3 of 5

Eastern District of New York - Live Database Version 4.0.2

ATTORNEY TO BE NOTICED

Counter Claimant**Mark Rosenstein**represented by **Robert L. Folks , Sr.**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Counter Defendant**Robert Novak**represented by **Robert Novak**
1550 Sunrise Highway
Copiaque, NY 11726
PRO SEDefendant**Aquabotanic.Com**

TERMINATED: 07/30/2007

Counter Claimant**Active Window Publications, Inc.**represented by **Cynthia A. Kouril**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED**Robert L. Folks , Sr.**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Counter Defendant**Robert Novak**represented by **Robert Novak**
(See above for address)
PRO SE

Date Filed	#	Docket Text
10/28/2009	<u>185</u>	Letter dtd. 10/21/09 from pltff. R. Novak to Judge Irizarry, in response to the Court's order for a joint status conf. and "requesting deft appear at a deposition, and if the Court believes pltff. should be deprived of a deposition, pltff. will have no choice but proceed to trial." (Return to chmb's.). (Layne, Monique) (Entered: 10/28/2009)
10/05/2009	<u>184</u>	ORDER granting in part and denying in part <u>179</u> Motion for Sanctions. See attached. Ordered by Magistrate Judge William D. Wall on 10/5/2009. c/m to

Attachment B

Eastern District of New York - Live Database Version 4.0.2

Page 4 of 5

		P (Hepworth, F.) (Entered: 10/05/2009)
09/24/2009	<u>183</u>	Letter to Judge Wall explaining that the Medical Authorization supplied by Plaintiff is non-responsive in that it excludes drug, alcohol and mental health and that other medical authorizations have not been supplied at all by Active Window Publications, Inc. (Kouril, Cynthia) (Entered: 09/24/2009)
09/21/2009	<u>182</u>	Letter dated 9/21/09 from Robert Novak to Magistrate Judge William D. Wall. Re: a corrected copy of an authorization to release healthcare information has been reserved. (Talbott, Thomas) (Entered: 09/22/2009)
09/15/2009	<u>181</u>	REPLY in Support re <u>180</u> Response in Opposition to Motion for sanctions filed by Active Window Publications, Inc.. (Attachments: # <u>1</u> Exhibit) (Kouril, Cynthia) (Entered: 09/15/2009)
09/14/2009	<u>180</u>	RESPONSE in Opposition to <u>179</u> MOTION for Sanctions filed by Robert Novak. Mailed by the plaintiff on 9/11/09 and received by the court on 9/14/09. (Talbott, Thomas) (Entered: 09/15/2009)
09/03/2009		PRETRIAL ORDER re <u>179</u> MOTION for Sanctions filed by Active Window Publications, Inc. The plaintiff must serve and file written opposition to the motion by September 11, 2009. No appearance is required on September 14, 2009, the date inserted by the movant as a return date. Ordered by Magistrate Judge William D. Wall on 9/3/2009. (Hepworth, F.) (Entered: 09/03/2009)
08/13/2009	<u>179</u>	MOTION for Sanctions by Active Window Publications, Inc.. (Attachments: # <u>1</u> Affidavit of C Kouril in support, # <u>2</u> Exhibit A-E, # <u>3</u> Exhibit F-K, # <u>4</u> Exhibit L-N, # <u>5</u> Exhibit O-P, # <u>6</u> Memorandum in Support, # <u>7</u> Affidavit of service) (Kouril, Cynthia) (Entered: 08/13/2009)
05/19/2009	<u>178</u>	Minute Order. for proceedings held before Magistrate Judge William D. Wall:granting <u>175</u> Motion for Extension of Time to Complete Discovery; Motion Hearing held on 5/19/2009 re <u>175</u> Letter MOTION for Extension of Time to Complete Discovery. New discovery deadlines have been set. These deadlines will not be extended. See attached order. The pretrial conference will be held on 11/17/09 at 11:00 a.m. Order entered by Magistrate Judge William D. Wall on 5/19/09. (Hepworth, F.) (Entered: 05/19/2009)
05/14/2009		ORDER granting <u>177</u> Motion for Extension of Time to File. The dispositive motion deadline is stayed, pending discussion at the conference on 5/19. Defendant shall serve a copy of this electronic order on the pro se plaintiff upon receipt. Ordered by Magistrate Judge William D. Wall on 5/14/2009. (Hepworth, F.) (Entered: 05/14/2009)
05/13/2009	<u>177</u>	Letter MOTION for Extension of Time to File <i>dispositive motions. Request to adjourn, sine die, the time to initiate dispositive motion practice, until discovery issues are resolved.</i> by Active Window Publications, Inc.. (Kouril, Cynthia) (Entered: 05/13/2009)
05/04/2009		ORDER granting <u>176</u> Motion to Adjourn Conference based on defense counsel's illness. The conference scheduled for 5/5/09 is adjourned to 5/19/09 at 11:00 a.m. Ordered by Magistrate Judge William D. Wall on 5/4/2009. c/m to pro se plaintiff, and telephone notice attempted. (Hepworth, F.) (Entered:

Attachment B

Eastern District of New York - Live Database Version 4.0.2

Page 5 of 5

		05/04/2009)
05/04/2009	<u>176</u>	Letter MOTION to Adjourn Conference <i>due to illness</i> by Active Window Publications, Inc.. (Kouril, Cynthia) (Entered: 05/04/2009)
04/20/2009		ORDER re <u>175</u> Letter MOTION for Extension of Time to Complete Discovery <i>and to notify the court that NO discovery, including automatic disclosures, has been received from plaintiff</i> filed by Mark Rosenstein. A conference will be held on May 5, 2009 at 2:00 p.m. in Courtroom 820 of the courthouse in Central Islip. c/m and faxed to pro se plaintiff at fax number of record. Ordered by Magistrate Judge William D. Wall on 4/20/2009. (Hepworth, F.) (Entered: 04/20/2009)
04/07/2009	<u>175</u>	Letter MOTION for Extension of Time to Complete Discovery <i>and to notify the court that NO discovery, including automatic disclosures, has been received from plaintiff</i> by Mark Rosenstein. (Kouril, Cynthia) (Entered: 04/07/2009)
01/12/2009	<u>174</u>	AFFIDAVIT of Service for order by <i>Magistrate Judge Wall</i> served on robert novack on 01/12/09, filed by Active Window Publications, Inc.. (Kouril, Cynthia) (Entered: 01/12/2009)
01/09/2009		NOTICE The court has received a series of letters that discuss discovery and other issues but do not seek court intervention. The parties are reminded that the court does not accept such letters, and that any appropriate filings by the defendant, who is represented by counsel, must be electronically filed or will not be considered. The defendant shall serve a copy of this electronic notice on the plaintiff upon receipt. Entered by Judge William D. Wall on 1/9/09. Associated Cases: 2:01-cv-03566-DLI-WDW, 2:02-cv-02978-DLI-WDW (Hepworth, F.) (Entered: 01/09/2009)

PACER Service Center			
Transaction Receipt			
10/29/2009 12:50:35			
PACER Login:	rf0439	Client Code:	novak
Description:	Docket Report	Search Criteria:	2:01-cv-03566-DLI-WDW Start date: 10/29/2008
Billable Pages:	4	Cost:	0.32

Attachment C

ROBERT L. FOLKS & ASSOCIATES, LLP
ATTORNEYS AT LAW

510 Broad Hollow Road, Suite 304A
MELVILLE, NEW YORK 11747
(631) 845-1900

ROBERT L. FOLKS
CYNTHIA A. KOURIL

TELECOPIER (631) 845-8779

Thomas L. Costa
Of Counsel

October 29, 2009

Honorable William D. Wall
United States Magistrate Judge
United States District Court, EDNY
100 Federal Plaza
Central Islip, New York 11722

*Re: Novak v. Active Window Publications, Inc., et al.
Index No. CV 01 3566*

Dear Judge Wall:

I am writing to ask you to clarify that portion of your Order which says:

To the extent that the defendants raised the issue of the plaintiff's failure to respond to requests to admit, the court notes that no motion specifically pertaining to that failure is before it. Each party will bear its own costs on this motion.

Rule 36(3) of the FRCP states in pertinent part:

A matter is admitted unless, within 30 days after being served, the party to whom a request is directed serves the requesting party a written answer or Objection addressed to the matter and signed by the party

Mr. Novak did not respond at all within 30 days. I am unclear what motion related to Requests for Admissions you are referring to. See, Baher-McKee, Jansen and Core, Federal Civil Rules Handbook – 2008 (C) 2007 Thompson-West at page 779, “Failure to respond in a timely fashion is deemed an admission.”, citing, Walsh v. McCain Foods, 81 F.3d 722, 726 (7th Cir 1996), Switch Music.com, Inc. v. U.S. Music Corp., 416 F.Supp.2d 812, 817 (C.D. Cal 2006) [No motion is necessary-unanswered requests are automatically deemed admitted], Kansas City Cable Partners v. Espy, 250 F. Supp.2d 1296, 1297 (D.Kon. 2003).

Attachment C

I included reference to plaintiff's failure to respond to the Requests to Admit as an example of his utter failure to abide by his discovery obligations. I am not sure what further motion the Court envisions with respect to the Requests for Admissions and, therefore, respectfully request a further Order clarifying that part.

Respectfully,

/s/ *Cynthia A. Kouril*
CYNTHIA A. KOURIL (CAK4899)

CAK:rq

cc: Robert Novak